United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM W. BLAKEY, :

Appellant, :

v. : Nos. 20405
20405

UNITED STATES OF AMERICA, : 20367

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SACHS, GREENEBAUM & FROHLICH

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December 30, 1966

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I.

18 U.S.C. Section 3109

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

II.

Federal Rule of Criminal Procedure 41

* * *

(c) Issuance and Contests. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant....It (warrant) shall command the officer to search forthwith the person or place named for the property specified...;

(d) Execution and Return With Inventory. The warrant may be executed and returned only within 10 days after its date.

* * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM W. BLAKEY,	:	
Appellant,	:	
v.	:	Nos. 20405 20505
UNITED STATES OF AMERICA,	:	
Appelle.	:	

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This Court has jurisdiction by virtue of Act of July 7, 1958, Pub. L. 85-508, Section 12(e), 72 Stat. 348, as amended, 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

Detective David Paul of the Metropolitan Police Narcotics Squad applied to the United States Commissioner for a search warrant for the entire premises in which appellant lived and apparently submitted the affidavit quoted in full in Appendix A of this brief and incorporated herein. The warrant was issued by the Commissioner at 4:08 p.m. on July 7, 1965 (tr. 33 and warrant contained in appellate record). The affidavit is dated July 7, 1965, and Detective Paul testified that he "tied up the affidavit on the 7th" (tr. 33), but the affidavit was not sworn to and subscribed before Commissioner Wertlieb until July 8, 1967. (See original typed affidavit in record docketed with this appeal), the day after the warrant was issued.

The affidavit in support of the search warrant recited that a "previously reliable source of information...stated that...Blakey was selling heroin out in the streets and also from his home..." However, it also recited that after Blakey was called on the telephone, the transaction would take place at a given intersection on the street. Affiant further alleged that on July 6, 1965, he observed Blakey leave his home and proceed to a given intersection where he allegedly transferred narcotics to an informer pursuant to

an agreement made sometime earlier that evening. (See Appendix A). At the trial, Detective Paul, who had applied for the warrant, testified that the "source" on whom he relied had never been to Appellant's home (tr. 122), had been a "user" (tr. 113), and had a case then pending against him which was subsequently dismissed (tr. 118-119).

The warrant was executed by Detective Paul and five other officers about 10:25 a.m. on July 12, 1965 (tr. 28, 35, 81-82). The almost five day delay between the issuance and execution of the warrant allegedly resulted from the lack of an earlier opportunity to execute it (tr. 29) due to routine police matters and the need to execute two other warrants during that period (tr. 29). As to these other warrants, one was executed Wednesday evening, July 7, 1965, at 221 F Street, N.W. (tr. 30-31) while the other was executed at 1314 Saratoga Avenue, N.E., the morning of July 12, 1965, prior to going to appellant's home (tr. 31,35).

In executing the search warrant, Officer Bush knocked on the door of 2024 4th Street, N.E. (tr. 40). Detective Paul, who said he knew Blakey prior to this occasion, saw the Appellant through a glass door panel about 15 to 20 feet away in the hallway of the house look towards the door and disappear (tr. 40-41, 45). Appellant did not come to the door at once (tr. 40). After appellant disappeared from view, Officer Bush

announced "This is the police. I have got a search warrant for the premises, and you will be forced to open the door". (tr. 41, 46). The officers did not know whether or not appellant heard this announcement (tr. 46), but the door was broken down and the premises forcibly entered within a few seconds thereafter (tr. 42-43). Appellant admitted hearing a knock on the door, but did not respond immediately as he was dressed only in underclothing (tr. 54). Officer Paul did not recall how appellant was dressed (tr. 49).

His oral motion to suppress having been heard and denied by Judge Schweinhaut on May 2, 1966, Appellant immediately proceeded to trial before the Court upon waiving his right to a jury trial. Judge Schweinhaut found appellant guilty of possession (count one) and concealment and sale (count two) as indicted. Appellant was sentenced to twenty (20) months to five (5) years on Count One and five (5) years on Count Two; said sentences to run concurrently.

STATEMENT OF POINTS

I. The search warrant issued by the Commissioner is void because the affidavit in support thereof was not sworn to until the day after its issuance. Therefore, the fruits of the search pursuant to the warrant should have been excluded by the trial court.

II. A search warrant for a home based on hearsay should not issue unless the Commissioner is informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, i.e., in the home.

III. Although a warrant may be valid on its face, when evidence reveals there was no basis or an insufficient basis for the affiant's belief that narcotics were where the informant claimed, then the Court must vitiate the warrant. This is especially so when the informant's credibility is affected by the fact that he has his own case pending against him.

IV. A search warrant must be executed "forthwith". The ten day period referred to in the rules applies only to the return of the executed warrant.

V. While executing a warrant in a private home, officers may not forcibly break and enter unless they have a valid search warrant and have been refused admittance.

SUMMARY OF ARGUMENT

I. IT IS PLAIN REVERSIBLE ERROR TO CONVICT APPELLANT ON EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT ISSUED WITHOUT A SWORN AFFIDAVIT ESTABLISHING GROUNDS THEREFOR FIRST HAVING BEEN CONSIDERED.

The affidavit allegedly in support of the search warrant issued for appellant's premises was sworn to on July 8, 1965. The search warrant recites that it was issued on July 7, 1965. Thus, the warrant was not based on a sworn affidavit as required by Federal Rule of Criminal Procedure 41(c) and was void. The fruits of its execution were therefor inadmissible in evidence.

II. THE COURT BELOW ERRED IN RULING THAT THE AFFIDAVIT IN SUPPORT OF THE COMMISSIONER'S SEARCH WARRANT WAS SUFFICIENT.

The affidavit in support of the search warrant for appellant's premises is based upon the assertion of an unidentified informant that appellant was selling heroin from his home and on the affiant's observation of appellant leaving his home to consummate an alleged sale. As to the informer's assertion, the affidavit also states that the informant would meet appellant at a given intersection to make a purchase. It gives no indication that the informant had been to or knew anything about appellant's home. As to the officer's observation, the

affidavit recites that the surveilance was undertaken sometime after the informant made telephone contact with appellant. Thus, there is a substantial interval of time before the officer's observation during which appellant could have secured the narcotics outside of his home. Accordingly, there were no underlying circumstances to support the informant's belief that narcotics were being sold from appellant's home. Therefore, there was not a substantial basis from which the Commissioner could have concluded that narcotics were in appellant's home and the warrant should not have issued.

III. THE COURT BELOW ERRED IN UPHOLDING THE VALIDITY OF THE SEARCH WARRANT WHEN THE EVIDENCE DEMONSTRATED THERE WAS NO BASIS FOR THE INFORMER'S ASSERTION THAT APPELLANT WAS SELLING NARCOTICS FROM HIS HOME.

Even if the affidavit in support of the warrant is sufficient on its face, the evidence before the trial court revealed that there was no basis for the informer's assertion that narcotics were being sold from appellant's home; thereby vitiating the warrant. During the trial, the affiant testified that the informer had never been to appellant's home. The informer's crdibility also came to light when the affiant testified that the informer had been a user of narcotics and had a criminal case then pending against him -- which was dismissed after this case was commenced. Accordingly, the evidence before the trial court vitiated the warrant.

IV. THE COURT BELOW ERRED IN RULING THAT THE ALMOST FIVE DAY DELAY IN EXECUTING THE SEARCH WARRANT WAS PERMITTED UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 41(c) (d) WHERE THE WARRANT COMMANDED THE SEARCH TO BE FORTHWITH.

The search warrant commanded the officers to conduct the search forthwith. However, there was a delay of almost five days before the warrant was executed with no impediment other than routine police business. Thus, the command of the warrant and of Federal Rule of Criminal Procedure 41(c) (d) were violated and the fruits thereof were inadmissible.

V. THE COURT BELOW ERRED IN RECEIVING IN EVIDENCE THE FRUITS OF AN ENTRY INTO APPELLANT'S PREMISES WHICH WAS ILLEGAL UNDER 18 U.S.C. SECTION 3109.

Appellant's home was forcibly entered within a few seconds after the officers allegedly announced their authority and purpose. Since the search warrant was invalid for the reasons stated in Arguments I and II, supra, the forcible entry was not authorized under 18 U.S C. Section 3109 which requires a valid warrant. Even if the warrant was valid, Section 3109 was nevertheless violated when the officers broke in without having been refused admittance as required by the statute. The fruits of an illegal entry are inadmissible.

ARGUMENT

I

IT IS PLAIN REVERSIBLE ERROR TO CONVICT APPELLANT ON EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT ISSUED WITHOUT A SWORN AFFIDAVIT ESTABLISHING GROUNDS THEREFOR FIRST HAVING BEEN CONSIDERED.

Appellant's convictions were based upon evidence seized pursuant to a search warrant which was issued by United States Commissioner Sam Wertlieb on July 7, 1965. The affidavit allegedly in support of this warrant was sworn to by Detective David Paul on July 8, 1965, the day following the issuance of the warrant (see warrant and affidavit in record docketed with this appeal).

Federal Rule of Criminal Procedure 41(c) unequivocally provides that "A warrant shall issue only on Affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant." It is clear that a search warrant issued without the prior consideration of a sworn affidavit is void. Sgro v. United States, 287 U.S. 206 (1932); Honeycutt v. United States, 277 F. 939 (4th Cir. 1921); F. R. Crim. P. 41(c). Since the warrant was invalid from its inception, neither the belief that it was valid nor the success of the search changed its character and the fruits of its use cannot be the basis of a conviction. See United States v. Merrit, 293 F.2d 742 (3rd Cir. 1961) and Supreme Court cases reviewed therein.

Accordingly, appellant respectfully urges that his convictions be reversed.

ARGUMENT

II.

THE COURT BELOW ERRED IN RULING THAT THE AFFIDAVIT IN SUPPORT OF THE COMMISSIONER'S SEARCH WARRANT WAS SUFFICIENT.

The search warrant in the present case was issued for the "entire premises occupied by William Wesley Blakey". The appellant contends that there were insufficient allegations; indeed, there were no significant allegations in support of the issuance of a search warrant for his home.

Where, as here, the Commissioner's judgment on the sufficiency of probable cause for the issuance of a search warrant is based solely upon an affidavit, the Court properly makes its own judgment on the same question, Schoeneman v. United States, 115 U.S. App. D.C 110, 317 F.2d 173 (1963). The test to be applied is whether there was a "substantial basis" for the Commissioner to conclude that narcotics were in the premises authorized to be searched. Rugendorf v. United States, 376 U.S. 528, 533 (1964); Jones v. United States, 362 U.S. 257, 271 (1960). In considering the validity of a search warrant, the reviewing court may consider only information brought to the Commissioner's attention. Giordenello v. United States, 357 U.S. 480, 486 (1964). While a reviewing court may pay substantial deference to a judicial determination of probable cause, "the court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a

rubber stamp for the police". Aguilar v. Texas, 378 U.S. 108, at 111 (1964). And when an affidavit is based upon hearsay information, as it was here:

> "The magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant...was credible or his information reliable". Aguilar v. Texas, supra, at 114. (Numbers added).

In this case, the appellant contends that there are no underlying circumstances to support the hearsay belief of the informant that the narcotics were "where he claimed they were"; i.e., in the house of the appellant. Therefore, appellant contends that there was not a substantial basis from which the Commissioner could conclude that narcotics were in the appellant's house.

The affidavit which was the basis for the issuance of the warrant in this case, mentions only two allegations relevant to the possibility that narcotics were in the premises occupied by the appellant. First, it is alleged that a "previosly reliable source of information...stated that it had been buying heroin from Blakey for the past several months and that Blakey was selling heroin out in the streets and also from his home where he could be reached by dialing 832-7999." (Emphasis added). To the extent that this

allegation relates to the premises for which the warrant was sought, the very next allegation in the affidavit from the same source of information contradicts it. The affidavit recites "the source further advised that when it called Blakey on 832-7999, Blakey would have the source meet him in the vicinity of 4th and Rhode Island Avenue, N.E., where the source would purchase the heroin from Blakey." Thus, the implication is clear from these two allegations and it is not contradicted elsewhere in the affidavit that the "previously reliable source" never made a purchase of narcotics in the premises sought to be searched and never saw narcotics in those premises and never was personally in the premises himself.* There is no indication of the basis for the bald assertion from the anonymous source that Blakey was also selling heroin from his home. To the contrary, the source's own further statement of his practice in buying from Blakey negates the assertion that he was selling from his home.

The only other allegation in the affidavit relevant to the premises as a source of narcotics traffic is the observation made by Detective Paul after the informer had made contact with Blakey and had been driven to the vicinity of 4th and Rhode

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* Had the Commissioner's suspicions been aroused by this inconsistency prompting him to inquire further about it, he would have learned from the affiant that the "source" had never been to Appellant's home (tr. 122).

Island Avenue. Detective Paul then drove near the premises 2024 4th Street, N.E., which he placed under surveilance sometime later. Detective Paul alleged that he observed Blakey leave the premises and walk to the intersection of 4th and Rhode Island Avenue where the alleged transaction for which Blakey was convicted subsequently took place. However, there was no way for Detective Paul to know where the narcotics allegedly involved in that subsequent street transaction came from. Appellant's house was not under observation from the time of the phone call until the time Detective Paul arrived at the house. In the interim between the phone call from the informer and Detective Paul's arrival near the premises of the appellant, appellant could have secured the narcotics from a number of places outside of his home; such as a car, a hole in the ground, a garage, a neighbor's house, another apartment in the building (while apparently appellant lived in a house, there is no indication in the warrant that the premises for which the warrant was sought was a single family dwelling), another person, etc. It could be no more than mere speculation on Detective Paul's part that the narcotics involved in the subsequent transaction actually came from the appellant's home.

The Government's reliance below on Jones v. United States, 122 U.S. App. D C. 370, 353 F.2d 908 (1965) was misplaced. In Jones the primary issue was whether the second facet of the

Aguilar rule; i.e., circumstances supporting the credibility or reliability of the informant, was met. However, in the present case, the question is primarily whether the first facet of Aguilar was present; i.e., was the magistrate "informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were..." Here, the affidavit clearly contains no such "underlying circumstances."*

Accordingly, appellant contends that the affidavit was insufficient, the warrant issued theron invalid, the fruits seized thereby improperly admitted into evidence -- all necessitating reversal of his convictions.

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* The affidavit in Jones, as here, recited that narcotics were being sold from a certain dwelling. However, the Jones affidavit further recited that the informant was furnished with police funds, was observed entering the dwelling without narcotics and emerging with narcotics. The informant then told the officers he had purchased the narcotics in the specified dwelling. As is evident, Jones involves a situation much different than the present where the informant had never been inside appellant's premises.

ARGUMENT

III.

THE COURT BELOW ERRED IN UPHOLDING THE VALIDITY OF THE SEARCH WARRANT WHEN THE EVIDENCE DEMONSTRATED THERE WAS NO BASIS FOR THE INFORMER'S ASSERTION THAT APPELLANT WAS SELLING NARCOTICS FROM HIS HOME.

Assuming, arguendo, that the warrant is valid on its face, the evidence developed before the court below revealed that there was no basis for the informer's assertion that Appellant "was selling heroin from his home" and the affiant's reliance thereon.

While the law is unclear as to the extent an evidentiary attack on the allegations supporting a warrant valid on its face will be permitted, Rugendorf v. United States, 376 U.S. 528 (1964), the Supreme Court in Rugendorf and the Court below (tr. 117-18) assumed such attack was proper and this Court should do likewise.

During the trial, Detective Paul, the affiant in support of the warrant, testified that the informant on whom he relied had never been to Appellant's home (tr. 122). He further stated that the basis for the informer's assertion that Blakey was selling from his home was

> that Blakey had told him (informer) that that phone number (which informant called) was where he (Blakey) lived. So the distinction I make (between selling in the streets and from home) is the source said when he called that number, he was calling Blakey at his home. (tr. 122).

In addition, there was evidence that the informer had been a "user" of narcotics (tr. 113) and had a case pending against him which was dismissed subsequent to the time he provided the information against Blakey (tr. 118-19). Thus, the unidentified informer's belief that Blakey was selling from his home was based on the sole fact that the number he dialed to reach Blakey was traced to that dwelling. Certainly this is at best speculation and clearly not sufficient probable cause to authorize invasion of the privacy of the home. Officer Paul's observation of Blakey leaving his home, the officer having arrived there some 15-20 minutes after contact was made (tr. 126), is also grounds for speculation, at best, that narcotics were on the premises. The issue then is whether the mere speculation of an informer under the pressure of a pending criminal charge plus the mere speculation of Officer Paul that nothing happened during the 15-20 minutes between the telephone contact and his arrival at Blakey's home constitutes probable cause to search the house.

While the use of anonymous informers is perhaps necessary for the enforcement of certain laws, when an arrest or a conviction or the invasion of the privacy of a home hangs by the slender thread of an unidentified informer, the court should carefully scrutinize a challenged proceeding to protect the integrity of our judicial system. This is especially so here

where the informer, faced with a criminal charge (which was subsequently dismissed), is under at least tacit pressure to supply information which would appeal to the authorities.

Thus, Appellant does not claim here that the unidentified informant's hearsay information as corroborated by the officer's observations is insufficient probable cause to sustain an arrest. Rather appellant contends that this evidence before the Court revealed that there was no basis for the general invasion of the privacy of the home in which appellant resided. Therefore, the warrant was improperly applied for and issued and appellant's convictions must be reversed.

ARGUMENT

IV.

THE COURT BELOW ERRED IN RULING THAT THE ALMOST FIVE DAY DELAY IN EXECUTING THE SEARCH WARRANT WAS PERMITTED UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 41(c) (d) WHERE THE WARRANT COMMANDED THE SEARCH TO BE FORTHWITH.

The printed affidavit form and search warrant for appellant's premises indicates that the warrant was issued at 4:08 p.m. on Wednesday, July 7, 1965 (see tr. 33). That warrant commanded the officers:

> to search <u>forthwith</u> the place named for the property specified, serving this warrant and making this search at any time in the day <u>or night</u> and if the property to be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized <u>and return this warrant and bring this property before me within ten days of this date, as required by law</u>. (see warrant in record docketed for this appeal) (Emphasis added).

This warrant was executed by six officers about 10:25 a.m. on Monday, July 12, 1965, (tr. 28, 35, 81-82). The almost five day delay between the issuance and execution of the warrant allegedly resulted from the lack of an earlier opportunity to execute it (tr. 29) due to routine police matters and the responsibility for executing two other warrants during that period of time (tr. 29). As to the other warrants, one was executed Wednesday evening, July 7, 1965, at 221 F Street, N.W., (tr. 30-31) while the other was executed on the morning of

July 12, 1965, at 1314 Saratoga Avenue, N.E., prior to going to appellant's home (tr. 31, 35).

Appellant contends that Federal Rule of Criminal Procedure 41(c) (d) requires that the warrant be executed not within ten days, but "forthwith" and that the almost five day delay in the circumstances of this case was unreasonable; thereby vitiating the warrant and making the search illegal. See Mitchell v. United States, 103 U.S App. D.C. 341, 258 F.2d 435 (1958). (Concurring Opinion of Bazelon, J.) and cases reviewed and cited therein. Moreover, appellant asserts that the command of the warrant, quoted supra, which is less ambiguous than Rule 41, directs the search to be "forthwith" while requiring the "return" to be within ten days. This interpretation of this particular warrant is fortified by the fact that the warrant invokes the extraordinary power of permitting the search to be made "at any time of day or night."* Permitting a search of a private home at night can only demonstrate the urgency contemplated by the law in executing such warrants. Certainly, if "forthwith" were intended to mean at the leisure of the narcotics squad any time within ten days there would be no need to permit the invasion of a private home at any hour of the night.

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* Presumably pursuant to 18 U.S.C. Section 1405 which carves out this special exception for nighttime searches.

While there may be compelling reasons which would justify a five day delay in executing a warrant, none are to be found in the facts of this case. The necessary time involved in executing a typical warrant is demonstrated by the fact that two were executed on Monday, July 12, 1966, by mid-morning (tr. 30-31, 35). Other than "routine police matters" and the execution of another warrant Wednesday evening, July 12, 1965 (tr. 29), no legitimate reasons were given for this delay.

To the extent there is ambiguity in construing Rule 41(c) with Rule 41(d), the Supreme Court has said:

> The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual. Sgro v. United States, 287 U.S. 206, 210 (1932).

Accordingly, appellant contends that in these circumstances, the almost five day delay was not "forthwith" as commanded by Rule 41(c). Therefore, appellant's convictions should be reversed as the warrant was illegally executed and the fruits thereof inadmissible at his trial.

ARGUMENT

V.

THE COURT BELOW ERRED IN RECEIVING IN EVIDENCE THE FRUITS OF AN ENTRY INTO APPELLANT'S PREMISES WHICH WAS ILLEGAL UNDER 18 U.S.C. Section 3109.

Section 3109 of Title 18, United States Code, provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. 18 U.S.C. Section 3109.

It is appellant's position that the forcible entry into his home was in violation of this statute for two independent reasons.

First, the statute by its own terms authorizes a forcible entry only "to execute a search warrant." Since the search warrant for appellant's premises was void because it was not based upon a sworn affidavit, see Argument I, supra, and because the Commissioner was not informed of the underlying circumstances which led the informer to believe that narcotics were where he said they were, see Argument II, supra, the statute does not authorize a forcible entry. In this regard, appellant respectfully requests that Arguments I and II be incorporated herein by reference.

Alternatively, assuming arguendo, that the warrant was valid, Section 3109 was violated in any event when the officers

forcibly entered appellant's premises without first having been "refused admittance" as required by the statute.

Officers Bush and Paul, in plain clothes, went to the front door of appellant's home. Officer Bush knocked on the front door and Detective Paul then observed Appellant inside the house about 15 to 20 feet down a hallway. Appellant did not come to the door, but looked toward it, turned and disappeared from view (tr. 40). At this time, Officer Bush announced that it was the police with a search warrant for the premises (tr. 41). Within a few seconds after the announcement, the door was forcibly opened (tr. 42-43) even though it was not known whether appellant could hear the announcement (tr. 46). Appellant was not in view when the announcement was made (tr. 46) through a closed door with a sealed window (tr. 48). However, appellant admitted hearing a knock on the door, but did not respond immediately as he was dressed only in underclothing (tr. 54). Officer Paul did not recall how Appellant was dressed (tr. 49).

On these facts, appellant contends that the officers were not "refused admittance" within the purview of Section 3109 and therefore their forcible entry was illegal.

While the phrase "refused admittance" does not require an affirmative refusal, Masiello v. United States, 115 U.S. App. D.C. 57, 317 F.2d 121 (1963), it does require the officers to

wait a reasonable time after announcing their authority and purpose. United States v. West, 328 F.2d 16 (2d Cir. 1964). What time is reasonable, of course, depends upon all the circumstances, see Martin v. United States, 341 F.2d 577 (5th Cir. 1965).

Here, the forcible entry was almost spontaneous with the announcement -- only "a few seconds" intervening. Unlike Masiello, where the officers waited considerably longer than here, there was no evidence of a "commotion" which would indicate the destruction of the items sought in the warrant. If the officers are permitted the inference that the failure to respond immediately within "a few seconds" indicates that evidence is in the process of destruction in this case, then in every case the statutory requirement that they be "refused admittance" would be reduced to a nullity. "A few seconds", on the facts of this case, is not a reasonable time -- especially when such items as "syringes, tourniquets, cookers and paraphenalia used in the preparation of heroin for retail," see affidavit and Search Warrant, are believed to be on the premises to be searched. As is obvious, these items are not instantaneously disposible like the "flash paper" in Masiello.

The evidence upon which appellant's convictions rest should have been excluded as seized pursuant to an illegal entry, Miller v. United States, 357 U.S. 301 (1958). As the

Supreme Court said in Miller:

> We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in Section 3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. 357 U.S. at 313.

Accordingly, appellant respectfully submits that the forcible entry into his home was in violation of 18 U.S.C. Section 3109 and that the fruits thereof were improperly admitted into evidence requiring reversal of his convictions.

CONCLUSION

For any and all the foregoing reasons, appellant prays that this Court reverse his convictions for possession and sale and concealment of narcotics and order that judgments of acquittal be entered on both counts.

Respectfully submitted,

SACHS, GREENEBAUM & FROHLICH
839 17th Street, N.W.
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(Appointed by this Court)

APPENDIX A

Met. Pol. Dept, MPDC
July 7, 1965

AFFIDAVIT IN SUPPORT OF A U.S. COMMISSIONER'S SEARCH WARRANT FOR THE PREMISES 2024 4th Street NE, Washington, D.C. entire premises occupied by William Wesley Blakey.

On July 6, 1965 Detectives Paul and Norman received information from a previously reliable source of information who stated that it was buying heroin from William Wesley Blakey. The/further stated that it had been buying heroin from Blakey for the past several months and that Blakey was selling heroin out of the premises and also from his home where he could be reached by dialing 8327999. The source further advised that when it called Blakey on 8327999, Blakey would have the heroin meeting in the vicinity of 4th and Rhode Island Avenue NE where the source would purchase the heroin from Blakey. The source stated that it would be willing to make a purchase of heroin from Blakey for the narcotic squad.

On July 6, 1965 the above mentioned source dialed 8327999 under the observation of Detective Paul. A man answered the phone and the source engaged him in conversation concerning the purchase of heroin, and the voice told the source to meet him at 4th and Rhode Island Avenue NE. The source then hung up the phone and advised the officer that the male voice was that of William Wesley Blakey.

Detective Paul searched the source and found it to be free of any money or narcotic drugs. Detective Paul then handed the source a sum of MPDC advance funds.

Detectives Paul and Norman then drove the source to the vicinity of 4th and Rhode Island Avenue NE where the source left the officers auto. Detective Norman kept the source under observation while Detective Paul drove to the rear of 2024 4th Street NE where he placed the premises under observation. Detective Norman observed Blakey leave 2024 4th Street NE and walk north on 4th Street to the intersection of 4th and Rhode Island Avenue NE where Blakey met with the source of information. Detectives Paul and Norman observed the source standing close together for several minutes and something was being passed between them. Blakey then left the source and walked south on 4th Street NE and the source rejoined the officers. The source turned over to Detective Paul a quantity of white capsules which it stated it had purchased from William Wesley Blakey with the MPDC advance funds. Detective Paul again searched the source and found it to be free of any money or narcotic drugs. The source was under officer observation from the time that it left the officers' presence until it returned and it was observed that the source did not contact anyone other than Blakey. During this, the undersigned was so advised by Detective Norman. The source of information identified MPDC identification photograph #[illegible] as being that of William Wesley Blakey.

Detective Paul performed a preliminary field test on the white powder in one of the capsules which indicated by a positive color reaction the presence of a narcotic drug of the opiate group.

William Wesley Blakey had previously been convicted for violation of the Uniform Narcotic Act (possession).

William Wesley Blakey has previously given 2024 4th Street NE as his home address and has given his mother's name as Mary Blakey.

Investigation reveals that the phone 8327999 is listed to a Mrs. Mary J. Blakey at 2024 4th Street NE.

Because of the information received from the previously reliable source during the events of July 6, 1965 along with the knowledge of Blakey's prior narcotic involvement, the undersigned does believe that there is now illicit narcotic drugs being secreted inside of premises 2024 4th Street NE, Washington, D.C. by William Wesley Blakey.

Detective Sergeant David Paul
Narcotic Squad, MPDC

Sworn to and subscribed to before me this 12 day of July, 1965.

Lee Wurtzel
U.S. Commissioner
Washington, D.C.

217-497

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was hand delivered to the office of the United States Attorney for the District of Columbia, United States Courthouse, Washington, D. C., this 30th day of December, 1966.

Peter R. Sherman

PETER R. SHERMAN
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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,405
20,505

WILLIAM W. BLAKEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
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Special Assistant
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Cr. No. 10-66

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*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,405
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WILLIAM W. BLAKEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed January 14, 1966, the grand jury charged appellant in separate counts with violation of 26 U.S.C. § 4704(a) by the unauthorized possession of heroin, and violation of 21 U.S.C. § 174 by the facilitation of concealment and sale of heroin, knowing it to have been imported contrary to law. After a trial without a jury, Judge Schweinhaut found appellant guilty as indicted, and sentenced him to 20 months to five years on the first count, and five years on the second count, said sentences to run concurrently. Appellant seeks review of his conviction solely on the ground that the narcotics described in the indictment were illegally seized, and that the trial

court therefore erred in denying his motion to suppress this evidence. The facts relevant to this contention need some discussion.

On July 6, 1965, Detectives Paul and Norman of the Narcotics Squad were told by a "previously reliable source" that he had been buying heroin from appellant "for the past several months" and that appellant "was selling heroin out in the streets and also from his home where he could be reached by dialing 8327999." Knowing that appellant had a record as a narcotics violator, Detective Paul immediately directed the informant to telephone 8327999 and to arrange to purchase more heroin from appellant in the same manner as prior transactions. Detective Paul listened to this conversation, and the informant identified the voice on the other end of the line as belonging to appellant (Tr. 123). Less than 15 minutes after this call, Detective Paul left the informant and Detective Norman at the place appellant had designated for the transaction, and drove on by himself to appellant's address. He arrived in time to watch appellant—who he knew by sight—walk out of his house, go directly to meet the informant, and sell a quantity of heroin capsules to the latter. Having thus substantiated the information from his "previously reliable source," Detective Paul applied to the United States Commissioner on July 7, 1965, for a warrant to search the premises occupied by appellant. Detective Paul's affidavit for the warrant first stated his belief that heroin and narcotics paraphernalia were unlawfully concealed on the named premises, and then referred to the attached affidavit in which he narrated the events of July 6th and listed other reasons which led him to think appellant had narcotics on his premises.[1] These included the informant's previous re-

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[1] Narcotic Squad, MPDC
July 7, 1965

AFFIDAVIT IN SUPPORT OF A U.S. COMMISSIONERS SEARCH WARRANT FOR THE PREMISES 2024 4th Street NE, Washington, D.C. entire premises occupied by William Wesley Blakey.

On July 6, 1965 Detectives Paul and Norman received informa-

tion from a previously reliable source of information who stated that it was buying heroin from William Wesley Blakey. The source further stated that it had been buying heroin from Blakey for the past several months and that Blakey was selling heroin out in the streets and also from his home where he could be reached by dialing 8327999. The source further advised that when it called Blakey on 8327999, Blakey would have the source meet him in the vicinity of 4th and Rhode Island Avenue NE where the source would purchase the heroin from Blakey. The source stated that it would be willing to make a purchase of heroin from Blakey for the narcotic squad.

On July 6, 1965 the above mentioned source dialed 8327999 under the observation of Detective Paul. A man answered the phone and the source engaged him in conversation concerning the purchase of heroin, and the voice told the source to meet him at 4th and Rhode Island Avenue NE. The source then hung up the phone and advised the officer that the male voice was that of William Wesley Blakey.

Detective Paul searched the source and found it to be free of any money or narcotic drugs. Detective Paul then handed the source a sum of MPDC advance funds.

Detectives Paul and Norman then drove the source to the vicinity of 4th and Rhode Island Avenue NE where the source left the officers auto. Detective Norman kept the source under observation while Detective Paul drove to the vicinity of 2024 4th Street NE where he placed the premises under observation. Detective Paul observed Blakey leave 2024 4th Street NE and walk north on 4th Street to the intersection of 4th and Rhode Island Avenue NE where Blakey was observed to make contact with the source of information. Detectives Paul and Norman observed Blakey and the source standing close together for several minutes and something could be seen being passed between them. Blakey then left the source and walked south on 4th Street NE and the source rejoined the officers. The source turned over to Detective Paul a quantity of white capsules which it stated it had purchased from Blakey with the MPDC advance funds. Detective Paul again searched the source and found it to be free of any money or narcotic drugs. The source was under constant observation from the time that it left the officers' presence until it returned and it was observed that the source did not contact anyone other than Blakey, as to this, the undersigned was so advised by Detective Norman. The source of information identified MPDC identification photograph #151318 as being that of William Wesley Blakey.

Detective Paul performed a preliminary field test on the white powder in one of the capsules which indicated by a positive color reaction the presence of a narcotic drug of the opiate group.

William Wesley Blakey had previously been convicted for violation of the Uniform Narcotic Act (possession).

William Wesley Blakey has previously given 2024 4th Street NE

liability and the appellant's record of narcotics involvement. On the strength of the two affidavits, Commissioner Wertleb issued the search warrant late on the afternoon of July 7, 1965.

Due to his other responsibilities and an intervening weekend, Detective Paul did not have sufficient time or assistance to execute the warrant during the next four days (Tr. 28-33). But at the "first opportunity," on the morning of July 12, 1965, he and the necessary other members of the Narcotics Squad went to appellant's premises at 2024 Fourth Street, N.E. To gain admittance to the house, one of the group of detectives at the front door, Officer Bush, "knocked on the door, and a short time after he knocked on the door, the defendant, who [Detective Paul] knew prior to this occasion, poked his head around the hallway, looking towards the door." Through a glass window in the door, Detective Paul saw appellant look at the detectives, "and then he turned, and he ran away." (Tr. 40). "At this time Officer Bush stated, 'This is the police. I have got a search warrant for the premises, and you will be forced to open the door.'" (Tr. 41). After Officer Bush made this announcement "in a very loud voice" and noted that appellant was going away, the detectives forced the door open

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as his home address, and has given his mother's name as Mary Blakey.

Investigation reveals that the phone 8327999 is listed to a Mrs. Mary J. Blakey at 2024 4th Street NE.

Because of the information received from the previously reliable source along with the events of July 6, 1965 along with the knowledge of Blakey's prior narcotic involvement, the undersigned does believe that there is now illicit narcotic drugs being secreted inside of premises 2024 4th Street NE, Washington, DC by William Wesley Blakey.

/s/ David Paul
Detective Sergeant David Paul
Narcotic Squad, MPDC

Sworn to and subscribed to before me this /s/ *8th* day of July, 1965.

/s/ Sam Wertleb
Sam Wertleb, U.S. Commissioner
Washington, D.C.

(Tr. 41, 81-83). They ran upstairs where they found appellant in a bedroom, "standing by the torn window screen, by the window in the second floor middle room. Outside was a cigarette package lying outside in an areaway behind the house." (Tr. 42, 83). Detective Paul "recovered the cigarette package, and found it had forty capsules of small quantities of white powder," which upon analysis proved to be heroin (Tr. 42). The subsequent search disclosed a large quantity of narcotics, including the 32 capsules of heroin that were the subject of appellant's indictment.[2]

On direct examination, appellant admitted that he had known both Detectives Paul and Bush for more than a year (Tr. 57), but denied that he had seen them through the door (Tr. 56), and asserted that he had not answered the door because he was dressed in only his underwear (Tr. 54).

Having heard the testimony of Detective Paul and appellant, Judge Schweinhaut denied the motion to suppress the items seized in the search (Tr. 73-74). And he adhered to this ruling after additional development of the facts in the course of the trial (Tr. 135-137, 141-142).

STATUTES AND RULE INVOLVED

Title 21, United States Code, § 174, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in

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[2] The following items, *inter alia*, were taken from appellant's home: a cream-colored envelope with 12 capsules full of heroin, a piece of newspaper containing 20 capsules full of heroin, a brown paper bag with 1,920 capsules, each having small quantities of heroin inside, a cigarette package with 40 capsules having small quantities of heroin, 16 other capsules with small quantities of heroin, and various narcotics paraphernalia (Tr. 37-38, 88).

violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26, United States Code, § 4704(a), provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 18, United States Code, § 3109, provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Rule 41, Federal Rules of Criminal Procedure provides in pertinent part:

> (c) *Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. . . . It shall command the officer to search forthwith the person or place named for the property specified. . . .
>
> (d) *Execution and Return with Inventory.* The warrant may be executed and returned only within 10 days after its date. . . .

SUMMARY OF ARGUMENT

It is frivolous to suggest that probable cause did not exist for the issuance of a warrant to search appellant's premises. A "previously reliable source" informed the police that he had been buying heroin from appellant, who was selling narcotics in the streets and "from his home." Even though appellant was known to have a record of narcotics involvement, two detectives thoroughly confirmed this particular information by having the source arrange to purchase heroin from appellant pursuant to the procedure he said he had used over the last several months, and then watching the entire transaction. Thus, personal observation of appellant's illicit activity by these detectives verified the informant's story beyond doubt, and amply established probable cause.

When appellant failed to answer their knock on the door, the detectives properly executed the search warrant by forcible entry. The officers announced their authority and purpose, and saw appellant run the other way as soon as he looked at them. Being aware that appellant knew them by sight, the detectives reasonably inferred from his behavior that he intended to dispose of the narcotics before he admitted them. They were therefore justified in forcing the door at once to prevent destruction of the evidence thought to be on the premises.

This search was accomplished well within the ten-day period authorized by the Federal Rules of Criminal Procedure. Moreover, the legitimate reason for the four-day interval between the warrant's issuance and execution vitiates appellant's complaint in this respect.

This appeal cannot be used as a vehicle to attack the validity of the search warrant because of an apparent discrepancy between the dates entered on the warrant and its supporting affidavit. Since this issue was not mentioned—and consequently not ventilated—in the lower court, it must be presumed that the warrant was issued in accordance with the specified procedure.

ARGUMENT

I. The facts recited in Detective Paul's affidavit disclosed more than adequate probable cause for issuance of a search warrant covering appellant's premises.

Appellant's primary contention that there was not a "substantial basis" to conclude that narcotics were kept on his premises reveals "exaggerated notions as to what was required to constitute a showing of probable cause." *Napolitano* v. *United States*, 340 F.2d 313, 314 (1st Cir. 1965). His attack on the validity of the search warrant ignores pertinent case law and disregards the obvious inferences to be drawn from the information recited in the affidavit filed to support the warrant.

A discussion of the relevant precedents must begin with the holding in *Jones* v. *United States*, 362 U.S. 257 (1960), that a search warrant may be issued upon hearsay alone "so long as a substantial basis for crediting the hearsay is presented." The Supreme Court there stated:

> "In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." At 269.

As interpreted by subsequent decisions, *Jones* permits the affiant to present independent evidence of the hearsay's reliability in many forms. The most substantial type of verification, though, plainly comes from investigation of the informant's assertions and personal observation of the suspect's activities by the police officers themselves. For this reason, the Supreme Court has stressed that judges should be loath to invalidate warrants where an informant's report furnished probable cause and the affiant corroborated this hearsay by his own personal observation. *United States* v. *Ventresca*, 380 U.S. 102 (1965). Noting that "a grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers

from submitting their evidence to a judicial officer before acting," Justice Goldberg stated for the majority in *Ventresca*:

> "[W]here these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting it in a hypertechnical, rather than a commonsense, manner. . . . [T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." At 108-109.

Judged by the standards enunciated in *Jones* and *Ventresca*, Detective Paul's affidavit so clearly exhibits probable cause as to make extended refutation of appellant's sophistic arguments unnecessary. Detectives Paul and Norman had received information from a "previously reliable source" that he had been buying heroin from appellant for the past several months and that appellant "was selling heroin out in the streets and also from his home where he could be reached by dialing 8327999." They immediately verified this account in the following manner: While Detective Paul listened on an extension, the informant telephoned appellant and arranged to purchase heroin in accordance with what the informant had described as the ordinary procedure. As soon as this conversation ended, Detective Paul drove the informant to the place where he and appellant had planned to meet, left him there under the observation of Detective Norman, and proceeded to appellant's address. Within a half hour after the telephone call by the informant, Detective Paul saw appellant leave his house, walk directly to where he made contact with the informant, and transfer something to him. When the transaction had been completed, the informant turned over five capsules of heroin that he had just purchased from appellant.[3] During this

[3] In accordance with standard police practices, the informant had been searched before the meeting to make certain that he had no

entire incident the detectives never lost sight of the informant. The very next day, July 7, 1965, Detective Paul obtained a warrant for the search of appellant's premises.[4]

The test to which Detectives Paul and Norman thus put the information they had been given by a "previously reliable source" established several ample bases to conclude that appellant kept narcotics on his premises.[5] *United States* v. *Gosser*, 330 F.2d 102 (6th Cir. 1964), *cert. denied*, 382 U.S. 819 (1965). Under Detective Paul's supervision, the informant dialed the telephone number listed at appellant's address and arranged with the appellant for the illegal purchase of narcotics. Overhearing this conversation was itself enough to justify Detective Paul in acting upon the informant's assertion that appellant sold heroin "from his home." *United States* v. *Conti*, 361 F.2d 153 (2d Cir. 1966). Furthermore, Detectives Paul and Norman saw the informant purchase heroin capsules by the precise method he said he had used in past dealings with appellant. Again, this observation alone gave sufficient credence to the informant's other allegations. *Rugendorf* v. *United States*, 376 U.S. 528 (1964) (police officer adequately checked the informant's story that stolen furs were located at a certain address by making certain that a robbery of such furs had been reported). In addition, Detective Paul watched appellant leave his house shortly after getting the informant's call and go straight to his meeting with the informant. He thereby acquired still another strong reason to believe the informant. *Draper* v. *United States*, 358 U.S. 307 (1959)

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narcotics on his person, and had been given MPDC advance funds to pay appellant for the heroin capsules.

[4] The dispatch with which Detective Paul sought a warrant upon acquiring probable cause distinguishes this case from *Schoeneman* v. *United States*, 115 U.S. App. D.C. 110, 317 F.2d 173 (1963).

[5] *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Giordenello* v. *United States*, 357 U.S. 480 (1964), may be readily distinguished on a variety of grounds, the most obvious being that the affidavits involved in those cases gave no indication that the affiant or informant spoke with any personal knowledge.

(probable cause for arrest established when the police officer verified the description received from an informant by his own personal observation of the suspect); *Jones* v. *United States*, 122 U.S. App. D.C. 370, 353 F.2d 908 (1965). That appellant may have been unwilling to transact his illicit business in his house suggests that he was afraid to draw attention to those premises, but it hardly represents behavior inconsistent with the inference that appellant had contraband narcotics stored on his premises.

Even if Detectives Paul and Norman had not substantiated their information in the fashion just outlined, it is arguable that the search warrant could nonetheless be sustained. For instance, the Second Circuit has held that corroboration is not essential where the affiant attests to the previous reliability of the informant. *United States* v. *Freeman*, 358 F.2d 459, *cert. denied*, 385 U.S. 882 (1966). But Detectives Paul and Newman were not satisfied to rely only upon the word of the informant, regardless of his previous veracity, and so they confirmed the accuracy of his allegations and gathered additional evidence of probable cause for the search warrant with extreme care. In *Ventresca*, Justice Goldberg aptly expounded the attitude that courts should take toward such conscientious law enforcement:

> "This Court is alert to invalidate unconstitutional searches and seizures whether with or without a warrant. . . . This Court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or overreaching. In our view the officers in this case did what the Constitution requires. . . . It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community." At 111-112.

These principles compel dismissal of appellant's argument as frivolous.

II. The evidence sustains the trial court's determination that the police officers were "refused admittance" within the meaning of 18 U.S.C. § 3109 before they forcibly entered onto appellant's premises.

(Tr. 42, 45, 47, 56, 60, 63)

Appellee contends that the manner in which the search warrant was executed fully accords with the procedure contemplated by 18 U.S.C. § 3109 and interpretative case law. The testimony accepted as true by the trial judge reveals that the police officers did not force their way into appellant's house until they had knocked on the front door, had seen appellant retreat back into the house as soon as he recognized them through a glass panel in the door, and had loudly announced their authority and purpose upon catching sight of appellant in the hallway. These circumstances clearly justified the inference that appellant intended to get rid of the narcotics before the search warrant could be executed, an inference confirmed when the officers reached appellant's room (Tr. 42). Therefore, a promptly entry by force was not only reasonable, but essential to prevent the destruction of the evidence thought to be on appellant's premises.

Numerous decisions hold on similar facts that the lack of response to a police officer's request constitutes a denial or refusal of admittance, *e.g.*, *United States* v. *Whiting*, 311 F.2d 191 (4th Cir. 1962), *cert. denied*, 372 U.S. 935 (1963); *United States* v. *Purgitt*, 176 F. Supp. 557 (D.C. D.C. 1959), and appellant apparently concedes as much by his citation of *Masiello* v. *United States*, 115 U.S. App. D.C. 57, 317 F.2d 121 (1963).[6] The present case most closely resembles *McClure* v. *United States*, 332 F.2d 19 (9th Cir. 1964), *cert. denied*, 380 U.S. 945 (1965), which held that a police officer could properly break into a house after waiting only four or five seconds in the following

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[6] In *United States* v. *West*, 328 F.2d 16, 18 (2d Cir. 1964), simply the fact that police officers heard movements inside the house was held enough to justify forcible entry after 30 seconds.

circumstances: the narcotics agent saw that his approach was observed by someone in the house; he knocked on the door, yelled that he was a federal agent with a search warrant, and demanded that the door be opened; and he heard footsteps going away from the door. The Court of Appeals ruled that the officer had been refused admittance, and therefore his conduct was entirely warranted.

The detectives in the present case reacted to factors which even more persuasively indicated an improper motive for appellant's refusal to open the door. Detective Paul and the other officers were aware that appellant knew them from previous meetings. Hence when he ran away from the door after seeing the officers, it was perfectly reasonable to surmise that he was going to dispose of the evidence, and that admittance consequently would not be forthcoming until it would be useless from their standpoint.[7] In this situation, the detectives necessarily had authority to force their way into the house at once.

The facts as developed before the trial court leave no doubt that the detectives acted upon a good faith belief that appellant had gone back into the house in an attempt to get rid of the illegally possessed narcotics. The trial judge so concluded, and further found that the officers gave sufficient notice of their authority and purpose, and waited a reasonable time before making a forcible entry. These are matters entrusted to the trier of fact. *Martin* v. *United States*, 341 F.2d 577 (5th Cir. 1965), and his determination can not be disturbed merely on the argu-

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[7] In *Miller* v. *United States*, 357 U.S. 301 (1958), police officers broke into a home after the occupant came to the door, opened it, and then attempted to close it. In view of the occupant's testimony that he had simply tried to close the door in order to release the chain, and the lack of anything in the record to suggest that the occupant knew the policemen's purpose, the Supreme Court found that the occupant's attempt to close the door was an "ambiguous act" and so did not justify forcible entry. The present case may be distinguished on two grounds: (1) appellant recognized the detectives and bolted upstairs—action which cannot be characterized as ambiguous, and (2) one of the detectives announced their authority and purpose in a loud voice.

ment that the conflicting testimony should have been weighed differently.[8] See *Davis* v. *United States*, 107 U.S. App. D.C. 76, 274 F.2d 585, *cert. denied*, 363 U.S. 806 (1960).

III. The four-day interval between issuance of the warrant and its execution did not make the search of appellant's premises illegal.

Appellant argues that because the police officers were forced to wait four days until they could execute the search warrant they did not comply with the warrant's command to "search forthwith the place named for the property specified," and that this rendered the search illegal. But *Mitchell* v. *United States*, 103 U.S. App. D.C. 341, 258 F.2d 435 (1958), rejected an identical contention, holding that a five-day delay in the execution of a search warrant was permissible. Indeed, this Court acknowledged that it properly had no concern with intervals of less than ten days before a warrant's execution because "the federal rule defines the word 'forthwith' by limiting the time of search to ten days after the issuance of the warrant." 103 U.S. App. D.C. at 342, 258 F.2d at 436. Rule 41 of the Federal Rule of Criminal Procedure unambiguously specifies that a search warrant may only be executed within ten days. Since this provision already reflects an accommodation between individual rights and the public interest in effective law enforcement, the latitude thus allowed law enforcement officials should not be shortened by judicial amendment. See *Murby* v. *United States*, 2 F.2d 56 (1st Cir. 1924).

In any event, the delay in this instance may be explained by the circumstances. Commissioner Wertleb is-

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[8] To support his assertion that he did not answer the door simply because he was dressed in his underwear, appellant testified that he had not seen the detectives outside (Tr. 60), that the door had a curtain which would have prevented anyone from seeing into the hallway (Tr. 56), and that he did not go to the window to throw out narcotics (Tr. 63). All this testimony was contradicted by Detective Paul (Tr. 42, 45, 47).

sued the search warrant late in the afternoon of Wednesday, July 7, 1965. While the Narcotics Squad did not make the search until Monday morning, July 12, 1965, this was due to the need to execute another warrant on the night of July 7, 1965, the press of other police business and court appearances during the next two days, and insufficient manpower to execute the warrant over the weekend. In short, Detective Paul received information from a reliable source that appellant was selling narcotics out of his house, and verified that information by personal observation on the same day, July 6, 1965. He then obtained a warrant on the following day, and executed it as soon as his other duties permitted. By no stretch of the imagination can this conduct be taken to reflect a lack of diligence.

IV. The validity of the search warrant cannot now be attacked upon the allegation that the police officer swore to the affidavit setting forth probable cause a day after the issuance of the warrant.

(Tr. 7, 32)

Despite the absence of any objection in the trial court (Tr. 7), appellant now complains that the warrant was not issued in strict accordance with Rule 41(c) because the warrant is dated July 7, 1966, and the supporting affidavit reads that it was "sworn to and subscribed to . . . this *8th* day of July, 1965." But the failure to mention this alleged defect either at trial or by motion to suppress—and the lucuna left by this neglect—forecloses appellant's belated attempt to magnify an apparent clerical mistake into reversible error. *Gray* v. *United States*, 114 U.S. App. D.C. 77, 311 F.2d 126 (1962), *cert. denied*, 374 U.S. 838 (1963); *Johnson* v. *United States*, 110 U.S. App. D.C. 187, 290 F.2d 378 (1961). See also *Baxter* v. *United States*, 119 U.S. App. D.C. 151, 337 F.2d 547 (1964); *Segurola* v. *United States*, 275 U.S. 106 (1927).

The logic of this rule is obvious. If the discrepancy had been brought to the attention of the trial court the issue

could have been quickly resolved by an evidentiary hearing. Such a procedure would have enabled the prosecution to stress that the search warrant recited that it was issued "upon formal written application (affidavits) of D/Sgt. David Paul, Narcotics Squad MPDC"; that it referred to "the affidavits attached hereto and made a part hereof" for a summary of the facts giving probable cause to believe that heroin was concealed on appellant's premises; and that the supporting affidavit was dated July 7, 1965. The prosecution could also have shown that every copy in its possession was marked as sworn to and subscribed to before Commissioner Wertleb on the *7th* day of July 1965. Furthermore, Detective Paul mentioned at trial that he "tied up the affidavit on the 7th." (Tr. 32). If put on notice as to the significance of this issue, the prosecution could have elicited further testimony from Detective Paul with respect to the preparation and presentation of his affidavit. And it could have secured testimony from the United States Commissioner that he never issues warrants without prior consideration of the supporting affidavits, and that his records showed that this particular instance was no exception.[9] It may thus be seen that the record contains none of the evidence that could have been introduced to sustain the validity of the warrant and to explain the discrepancy in dates. For this reason, the failure to ventilate this issue in the lower court precludes its consideration on appeal.

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[9] An accusation that Commissioner Wertleb committed such deliberate and flagrant malfeasance can hardly be supported by the discrepancy in dates entered on the warrant and affidavit. That discrepancy more likely resulted from an inadvertent clerical error.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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